

**OPINION
66-417**

June 3, 1966 (OPINION)

Mr. Roger Schell

Assistant State's Attorney

Bottineau County

RE: Taxation - Use Tax - Funeral Homes

This is in regard to your letter of May 24, 1966, in which you requested an opinion as to the application of the North Dakota use tax law to funeral homes operating within the state of North Dakota.

Your letter is quoted in part as follows:

The North Dakota Funeral homes now pay two and one-fourth percent use Tax on the merchandise they sell, which includes caskets, burial vaults, flowers, etc. The funeral homes do not pay or collect Use Tax on the services rendered.

Who should pay use tax on the embalming chemicals and supplies that are used in the embalming procedure?

Should the funeral homes pay use tax to the manufacturer of these chemicals? Or is the embalming chemicals and supplies Tax exempt, because it is used to conduct a tax exempt service.

Or should the cost of the embalming chemicals be charged to the cost of the funeral service as merchandise sold and therefore Use Tax charged to the next of kin, estate, or whoever pays for the funeral expenses.?"

Rule No. 53 of the North Dakota Sales and Use Tax Rules and Regulations pertains to undertakers and funeral directors. This rule is quoted as follows:

A funeral director or undertaker is engaged in the business of selling tangible personal property to consumers including such articles as caskets, grave vaults, and occasionally, grave clothing and flowers. He is also engaged in the business of rendering services such as embalming and providing livery service and other equipment in the conducting of funerals. A funeral director is liable for tax measured only by his gross receipts from sales of tangible personal property. No tax arises on receipts from services which he renders such as those which were enumerated above.

In certain instances funeral directors and undertakers make a practice of charging lump sums to customers covering the entire cost of the funeral, and they prefer not to separate the charge for services and the charge for tangible personal property in

the bill tendered to the customer. In such instances, they have the option of reporting to the Tax Commissioner the fair selling price of the tangible personal property sold and paying the tax upon gross receipts from such an amount. For the purposes of the Act, the Tax Commissioner will consider the fair selling price of the casket to be a price double that at which the casket was purchased by the funeral director. Gross receipts from the sale of grave clothing, vaults, flowers or other tangible personal property should in this case be included in the amount of their actual selling price to the consumer.

In any case, it is the intention of the Act that the funeral director shall pay the tax measured by his gross receipts from sales of all tangible personal property as shown by the bill tendered to the customers, and it is only in exceptional instances where he does not desire to make a separation in the charges to the customer that this method of determining the selling price of the casket may be adopted.

The funeral director must keep his books so as to show clearly these separate sources to receipts, and invoices and sales records must clearly reflect the selling price of tangible personal property sold."

As you will note, the above rule provides that the activities of a funeral director or undertaker for sales and use tax purposes fall into two distinct classes; that is, the director is regarded as being engaged in the business of selling tangible personal property, such as caskets, vaults, grave clothing, flowers, etc., and as such is required to collect and remit to the office of the state tax commissioner use tax on these items. In addition, the director is also regarded as rendering or furnishing a service, such as embalming, livery services, conducting funerals, etc., which service is not subject to the North Dakota use tax.

Sales and use tax rules of other states that are very similar to Rule No. 53 have been regarded by the courts as valid and reasonable rules, and the courts generally hold that, for sales and use tax purposes, funeral directors are regarded as retailers when they sell tangible personal property, such as caskets, and grave vaults, grave clothing and flowers, and as retailers they are required to collect tax on sales made by them, and, in addition, funeral directors are regarded as rendering personal service with respect to the embalming and preparation of a body for burial, which service is not subject to sales or use tax. In this connection, see *Kistner v. Iowa State Board of Assessment and Review*, 280 N.W. 587; *Ahern v. Nudelman*, 29 N.W. 2d 268; and *Commonwealth v. Dinnien*, 182 Atl. 542.

The North Dakota sales and use tax rules and regulations generally provide that when a person is engaged in rendering a nontaxable service the person rendering the service is regarded as the final user and consumer of all items of tangible personal property used and consumed by him in rendering the service, and sales of such items to the person rendering the service are regarded as sales for final use and consumption and are subject to tax. This use tax is to be collected by the supplier of the items if the supplier holds a North

Dakota sales and use tax permit. If the supplier does not hold a North Dakota sales and use tax permit, the tax is to be remitted by the final user and consumer to the office of the state tax commissioner. In this connection, see sales and use tax Rules 47, 48, 49 and 125, which rules provide that physicians, surgeons, dentists, optometrists and hospitals are required to pay tax on items of tangible personal property purchased by them for final use and consumption in rendering a nontaxable service. These rules are merely illustrative of this principle and are not the only rules in which this theory has been employed.

In view of the above, it is our opinion that items of tangible personal property, such as embalming chemicals and supplies used in the embalming procedure, are regarded for North Dakota use tax purposes as items of tangible personal property purchased for use and consumption by the funeral director in performing a nontaxable service, and as such are subject to North Dakota use tax when purchased by the funeral director. Items of tangible personal property, such as caskets, grave vaults, clothing, etc., the title to which is transferred to person or persons ordering same, are regarded as sales made at retail by the funeral director, and as such the director has a use tax collection responsibility with respect to those items.

ATTORNEY GENERAL

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